

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/566,711

Applicant(s)

MOTOURI ET AL.

Examiner

DEBBIE K. WARE

Art Unit

1651

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 July 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☒ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: None.
 Claim(s) objected to: None.
 Claim(s) rejected: 1-10.
 Claim(s) withdrawn from consideration: None.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/DKW/
Deborah K. Ware
Examiner

/David M. Naff/
Primary Examiner, Art Unit 1651

Art Unit: 1651

Continuation of 11, does NOT place the application in condition for allowance because: The argument that there is no mention of LPO and hence Kato fails to inherently teach at least 91% purity of LPO is noted. However, in order for Applicants to actually get at least 91% purity they must first yield 11 g of lactoperoxidase (note Applicants' specification at page 10, last line on the page), and based upon this premise and the Kato teaching that the basic protein fraction derived from milk which is the same source of Applicants' fraction, consists of 95% or more protein, note col. 3, line 14, a purity of at least 91% purity is inherent because the protein purity is based upon how much yield is obtained. Therefore, lactoperoxidase can be 95% or more of the total yield of protein which means it can be present in a higher amount in grams of the lactoperoxidase (e.g. at least 11 grams). Therefore, the purity is dependent upon the yield of lactoperoxidase obtained and Applicants' promoter as claimed also can be alternatively a digestion product thereof having a molecular weight within the range of 10,000 or less. Kato clearly teaches the digestion product to have a molecular weight well within this range too, see col. 3, lines 47-48. Kato does teach promoting the growth of osteoblasts, of which has a bone reinforcing effect, note col. 1, lines 5-15. It should be noted that osteogenesis is the process of laying down new bone material by osteoblasts. Thus, osteogenesis is inherently promoted by the promoter of Kato because the growth of osteoblasts is promoted which is relevant to bone development. Furthermore, the purity obtained is solely based upon how the product is prepared and not the product itself. The product as claimed and as disclosed are the same and hence the claims are considered to be anticipated by the teachings of Kato. Also Applicants state that Kato requires two proteins each of which must be at least 40wt%, however, the protein can be present in an amount of 95wt% or more and hence this would read on a lactoperoxidase of at least 91% and it is conceivable that the same results with a highly purified lactoperoxidase would be expected contrary to Applicants arguments based upon the test results of the instant response filed after final. While the results obtained by Applicants in comparison to Kato are noted it should also be noted that Kato is not so limited in its teaching in the examples and the fraction can consist of 95% or more protein which can be digested to a digestion product thereof by a protease, wherein this product is well within the molecular weight range as claimed. Furthermore the claims are not so limited to at least 91% purity because the claims are directed to a digestion product as well.